CONSEQUENTIAL DAMAGES IN EMINENT DOMAIN IN PENNSYLVANIA.*

DAMAGES TO PROPERTY IN THE VICINITY.

In this case the property damaged is not actually taken, it is merely injured or destroyed,[55] consequent upon the taking of the other land in the vicinity. We must distinguish between construction and operation. In neither case was there any right of recovery before the Constitution of 1874 except in the case of negligence. The constitutional provision vests in an owner, whose land is not taken, a right to recover damages caused by the construction or enlargement of the work on the land taken, and since no statute has been passed the remedy is solely by an action of trespass.[56]

Questions may arise as to the liability of the corporation to an adjoining owner as such entirely apart from the law of eminent domain.[57]

It was well settled that there was no liability to an adjoining owner for damages caused by the operation of the works on the land acquired by purchase, gift, or under proceedings in eminent domain, in the absence of negligence, where the corporation had the power of eminent domain.[58]

* Continued from the November issue, 65 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 51.

[55] Of course, if the property is real estate it cannot be destroyed. This word can only be taken to refer to improvements upon the land.

[56] Accordingly, in the following cases there was a recovery: Fredericks v. Canal Co., 148 Pa. 317 (1892). This was an action on the case against the canal company to recover damages for overflowing plaintiff's land caused by raising of defendant's dam. The defendant probably had the power of eminent domain, although not so expressly stated. Crum v. R. R. Co., 226 Pa. 151 (1910); damages to plaintiff's water power caused by change in bed of stream on land adjoining.

[57] *E.g.*—Lateral support, Ruppert v. Railroad Co., 25 Pa. Super. Ct. 613 (1904); Pettit v. Railroad Co., 222 Pa. 490 (1909); diversion of water, Todd v. Railroad Company, 27 Pa. Super. Ct. 577 (1905).

[58] In these cases there was no recovery in an action of trespass on the case: Railroad Co. v. Lippincott, 116 Pa. 472 (1887). The court said that the injury arose from operation, that the rule in the state was to impose on corporations a direct responsibility for everything for which a natural person would be liable; that the rule is not to be departed from; that the defendant was not liable unless guilty of a nuisance, which the court

These consequential damages are not recoverable under the Constitution of 1874 because the proviso imposes a liability for the construction and enlargement of the works, not for operation. This point has not been taken in the Supreme Court. The grounds upon which the courts limited the liability for the operation of the works is not altogether clear. The principal reason advanced was that the damages are too remote, and speculative, such damages as are inflicted on everyone else in the neighborhood, and to impose them would ruin the public enterprise.

There are, however, two recent cases in which the Supreme Court appears to depart from the former rule and lay down the principle that the power of eminent domain does not confer an immunity where the operation of the works amounts to a nuisance. In *Stokes* v. *Railroad Company*,[59] a property owner brought an action at law against the railroad company for damages caused by the operation of a tower on the right of way, to wit, a flow of acids from the tower house. The plaintiff alleged negligence. A nonsuit was reversed on appeal, the Supreme Court in an opinion by Stewart, J., saying that the action was for damages caused by the maintenance of a nuisance, that negligence was not involved and the allegations of it were immaterial, and the plaintiff was therefore entitled to go to the jury. Nothing was said by the court about the proposition laid down in the former cases, that the power of eminent domain takes away the nuisance character of the acts.

In *Ganster* v. *Electric Light Co.*,[60] the plaintiff was held entitled to recover damages in an action of trespass caused by

seemed to think would be the making of more smoke or dust than is lawfully allowable in the working of its machinery. Railroad Company v. Marchant, 119 Pa. 541 (1888); Dooner v. Railroad Company, 142 Pa. 36 (1891); Wunderlich v. Railroad Company, 223 Pa. 114 (1909), *accord.* Himmell v. Railroad Co., 175 Pa. 537 (1896), filling between piers of bridge on right of way. Gilles v. Railroad Company, 226 Pa. 31 (1909); Ridgway v. Railroad Company, 244 Pa. 282 (1914), elevation of track on right of way. In these cases of elevation of tracks, it might be possible to argue that the corporation was enlarging its works and thus incurring a liability for the damages under the strict construction of the constitutional provision imposing a liability for property injured or destroyed by construction or enlargement.

[59] 214 Pa. 415 (1906).

[60] 214 Pa. 628 (1906).

the operation of an electric light plant company which had no power of eminent domain. The case is not in point as a decision, but the Supreme Court, in an opinion by Mestrezat, J., said, by way of *dictum*,[61] that if the annoyance or damage arising from a nuisance is such as to destroy or substantially impair the legitimate use or occupation of private property and so amount to a taking the property owner injured is entitled to recover notwithstanding the fact that the defendant company possesses the power of eminent domain. The court distinguished *Railroad Company* v. *Lippincott*,[62] on the ground that there the defendant's land was on the other side of the street from the property of the plaintiff. It is submitted, however, that there are many cases where the operation of the public works will seriously depreciate the value of the property and inflict the same damage as if a part were taken, and yet there is no recovery. The rule laid down in this *dictum* makes the right of the plaintiff to recover depend upon the extent and amount of the damage. It is apprehended, however, that the distinction taken as to the case of *Railroad Company* v. *Lippincott* is not in point because the fact that there was a street between seems to be entirely immaterial, as in that case the plaintiff's right to recover did not depend at all upon the fact that he was an abutting owner on the street, and the Supreme Court treated the case entirely as if the street were not there.

Williams, J., in *Insurance Co.* v. *Railroad*,[63] said that in order to sustain recovery the property must be that which is invaded in the exercise of the right of eminent domain or that which abuts on the highway which is invaded, and that there is no authority for the proposition that the property alleged to have been injured need not adjoin nor have any physical relation to the defendant's work. This is open to serious question.

Where, however, there is no power of eminent domain, the corporation is liable for any use of the land beyond the limits allowed at common law, irrespective of negligence. In these

[61] At p. 632.
[62] 116 Pa. 472 (1887).
[63] 151 Pa. 334 at 339 (1892).

cases the corporation is said to be guilty of maintaining a nuisance.[64] It is probable that a coal railroad built and operated on coal land in Pennsylvania would not be a nuisance.[65]

Disturbance of Public Highways.

We have now reached in the discussion the case of damage to abutting and non-abutting owners caused by a disturbance of a public highway which may be by change of grade, by the construction, enlargement, or operation of (a) a public use, (b) a sewer within the lines of the highway.

Change of Grade.

A change in the grade of an existing highway may and generally does depreciate the value of the abutting property. There is in this case no exercise of the power of eminent domain, as there is no taking of property. The taking having occurred when the highway was first opened, the right to recover depends entirely on the constitutional provision or statutes passed in pursuance thereof, and it is not necessary for the abutting owner to show any title to the bed of the street in order to recover.[66] The grade may be changed by the city or by a private corporation constructing or enlarging its works in the vicinity.

The right to recover damages for change of grade is conferred by several statutes, and the law is clear that where a

[64] A few of these cases are as follows: Pottstown Gas Co. v. Murphy, 39 Pa. 258 (1861), where it was held that the gas company was liable in trespass for damages caused by the maintenance of gas works. The company had no power of eminent domain, only the right to enter upon streets, lanes and alleys. Rogers v. Phila. Traction Co., 182 Pa. 473 (1897). Hauck v. Pipe Line Co., 153 Pa. 366 (1893). The *dictum* of this case is that the power of eminent domain takes away the characteristics of a nuisance. Ganster v. Electric Light Co., 214 Pa. 628 (1906), trespass, electric light plant. A bill in equity for an injunction will lie to restrain operation of a railroad constructed without power of eminent domain as being a nuisance, Stewart's App., 56 Pa. 413 (1867); the railroad was constructed in a private alley of which the plaintiff's property had the free use.

[65] For a case where there was such a railroad apparently not built under the lateral railroad law, see Phillip v. Railway, 189 Pa. 309 (1899).

[66] Hobson v. Phila., 150 Pa. 595 (1892).

statute has been passed, the remedy of the land owner thereon is exclusive and he may not bring an action of trespass. Where, however, there is no statute, he may bring an action of trespass on the case.[67]

In *Lafean* v. *York County*,[68] the property owner brought an action of trespass and recovered damages caused by the construction of the approaches to a bridge in the highway in front of his property. He had instituted proceedings under the Act of May 16, 1891,[69] which were dismissed by the court as inapplicable to the case. Consequently, as there was no other statute providing a remedy, he was allowed an action of trespass. In *Cooper* v. *Scranton City*,[70] trespass was brought against the city for damages for change of grade, and judgment for the plaintiff was reversed, the court saying that his remedy was by proceedings before viewers either under the Act of May 23, 1889,[71] relating to cities of the first class, or the Act of May 16, 1891.[72]

The statutes applicable are, the Act of May 24, 1878,[73]

[67] In Borough of Beltzhoover v. Gollings, 101 Pa. 293 (1882), in an action of trespass against a borough to recover damages for change of grade, it was held that the statutory remedy under the Act of May 24, 1878, P. L. 129, was exclusive, and that therefore so much of the claim of the plaintiff as related to change of grade must be thrown out of the case, quoting the provisions of the Act of March 21, 1806, Sec. 13, as to exclusiveness of statutory proceedings. See White v. Borough of McKeesport, 101 Pa. 394 (1882), *accord*. In McKee v. Pittsburgh, 7 Pa. Super. Ct. 397 (1898), in a similar proceeding in trespass, the court held that the remedy under the Act of May 16, 1881, P. L. 75, in the case of cities, was exclusive. In Philadelphia, where the change occurred prior to 1874, the remedy was exclusively under the Consolidation Act of 1854. Schuler v. Philadelphia, 22 W. N. C. 161 (1888); trespass judgment for defendant. Plaintiff's remedy was exclusively under Consolidation Act of February 2, 1854, Sec. 27, P. L. 37, which vested jurisdiction solely in the Quarter Sessions, and the Act of June 13, 1874, P. L. 283, which gave a right of appeal. See Philadelphia v. Wright, 100 Pa. 235 (1882). In several cases arising before a statute was passed applicable to the case, the right to sue in trespass was sustained. Plan 166, 143 Pa. 414 (1891); Groff v. Phila., 150 Pa. 594 (1892); Hobson v. Phila., 150 Pa. 595 (1892). These cases are now obsolete as to the form of action since the Act of May 16, 1891, P. L. 75. Lloyd v. the City, 17 Phila. 202 (1884); *In re* Orthodox Street, 29 W. N. C. 411 (1892).

[68] 20 Pa. Super. Ct. 573 (1902).

[69] P. L. 75.

[70] 21 Pa. Super. Ct. 17 (1902).

[71] P. L. 277.

[72] P. L. 75.

[73] P. L. 129.

relating to the liability of boroughs; the Act of May 16, 1891,[74] imposing the liability on cities, and the Act of May 28, 1913,[75] relating to townships.[76]

The Act of May 16, 1891,[77] provides a remedy for assessing damages against a municipality for damages caused by change of grade. Under this act the property owner may recover damages for a change from original level made necessary in order to construct sewers to abate a nuisance,[78] and may recover damages for opening and changing from natural grade in one proceeding. The leading case on this point is *Pusey* v. *City of Allegheny*,[79] in which case there was a feigned issue in the Common Pleas on appeal from the report of viewers. The jury returned a verdict assessing damages for (a) opening, (b) change of grade, and it was held that judgment should be entered for the full amount of the verdict comprising items (a) and (b). It was contended that the property owner must pursue his remedy under the Act of 1870 for damages for opening, and under the Act of May 1, 1876,[80] for the damages caused by the grading. The court, however, said that such method of splitting damages resulting from a single transaction was contrary to legal policy, and not to be supported by the acts cited. This case has been followed ever since, and where the damages for grading and opening have been assessed in one proceeding, there can be no recovery for damages when the street is subsequently physically opened.[81] The Act of May 16, 1891,[82] ap-

[74] P. L. 75.

[75] P. L. 368.

[76] It is to be noted that townships were held exempt altogether from liability for damages for change of grade on the ground that they were not corporations invested with the power of taking private property for a public use, and therefore liable only when so provided by act of the legislature. Wagner v. Salzberg Township, 132 Pa. 636 (1890). Shoe v. Township, 31 Pa. Super. Ct. 137 (1896).

[77] P. L. 75.

[78] Rudderow v. Phila., 166 Pa. 241 (1895).

[79] 98 Pa. 522 (1881).

[80] P. L. 86.

[81] Sedgely Ave., 217 Pa. 313 (1907). Proceedings in the Common Pleas under the Act of 1891.

[82] P. L. 75.

plies as well to boroughs as to cities.[83] The distinction between the Act of May 16, 1891, and the Act of May 24, 1878,[84] was pointed out in *Maxiter* v. *Freeport Borough*.[85] Under the former act a property owner may recover damages for change of grade of the driveway of the street without reference to the fact of any future change of the grade of the footway.[86]

The construction of the Act of May 24, 1878,[87] is clear. It is not retroactive, and consequently where grade was changed in 1871, the property owner had no remedy under it.[88] The act authorizes the borough to direct a grading without a petition of the majority of the property owners. The borough is liable under the act for a change from natural grade,[89] and for a change of grade of a road running beyond the borough.[90] The cause of action accrues when the work is done on the ground,[91] and the right of the property owner to recover damage is not defeated by the circumstance that the change of grade was made at his request, as he designated, and was a substantial advantage to him.[92] The property owner is also entitled to recover damages although the change of grade was not made immediately in front of his property, the change only coming to one line of his lot.[93] The time of taking an appeal under the act is within thirty days from the time of filing the report, as provided in the Act of June 13, 1874.[94]

[83] Nicholson Boro., 27 Pa. Super. Ct. 570 (1905); Marcoz v. Wilmerding Boro., 37 Pa. Super. Ct. 185 (1908).

[84] P. L. 75.

[85] 48 Pa. Super. Ct. 146 (1911).

[86] Frick v. Philadelphia, 60 Pa. Super. Ct. 283 (1915).

[87] P. L. 129.

[88] Folkenson v. Borough of Easton, 116 Pa. 523 (1887). It was not decided in this case whether the right of the property owner was barred by the statute of limitations.

[89] Borough of New Brighton v. Church, 96 Pa. 331 (1880); Hendrick's Appeal, 103 Pa. 358 (1883).

[90] McLain v. West Washington Boro., 51 Pa. Super. Ct. 471 (1906).

[91] Jones v. Borough of Bangor, 144 Pa. 638 (1892).

[92] Lewis v. Borough of Darby, 166 Pa. 613 (1895). The property owner could assert his constitutional right unless he waived it or estopped himself. There was no evidence of either in the case.

[93] Lewis v. Homestead, 194 Pa. 199 (1899).

[94] P. L. 283. Carroll v. Mt. Jewett Boro, 49 Pa. Super. Ct. 118 (1912).

The owner of a lot which does not abut upon the street may recover damages for change of grade if his lot is sufficiently near the street grading to make the injury proximate, immediate and substantial.[95] If, however, the injury is not proximate, immediate and substantial, there can be no recovery.[96]

The elevation of railroad tracks in city streets, and the change of grade of streets consequent upon the abolition of grade crossings, have given rise to several questions. In *Tucker Street, Plumb's App.*,[97] a railroad elevated its tracks, which had been constructed on its private right of way, and the city depressed a street in order to abolish a grade crossing. An owner who did not abut on the street graded but whose lot adjoined the right of way of the railroad and who was injured by the elevation of the railroad tracks, which increased the labor and

[95] In Mellor v. City, 160 Pa. 614 (1894), the plaintiff's lot was situate on a street which connected at each end with two other streets, both of which were graded in the same direction opposite the point of connection. The result of this was that the plaintiff's only method of access at each end of the street was rendered in one direction more difficult, and it was held that he could recover. In Chatham Street, 191 Pa. 604 (1899), the plaintiff's lot drained through two connecting alleys into the street which was graded, in consequence of which the use of the alleys for drainage was rendered impossible. Proceedings were under Act of 1891. In Robbins v. Scranton, 217 Pa. 577 (1907), the non-abutting owner sued to recover damages caused by change of grade of streets in the vicinity of his lot. The Supreme Court ordered a new trial and said, "If as a result of the entire plan of improvement the plaintiffs were afforded safe and convenient access to their property, they could not be said to have suffered any permanent, substantial and proximate injury as a result of the change." In Walsh v. City of Scranton, 23 Pa. Super. Ct. 276 (1903), a verdict for the non-abutting lotholder in the court below was affirmed on appeal. The plaintiffs abutted on a lot fronting on a street which opened into the street graded, and the change of grade made vehicular traffic from the graded street into the street on which the plaintiff's lot fronted dangerous if not impossible. Haggerty v. Scranton, 23 Pa. Super. Ct. 279 (1903), *accord*. Cf. O'Brien v. The Railroad Company, 119 Pa. 184 (1888), *semble;* change of grade of street by railroad company in constructing its road.

[96] In Ogontz Ave., 225 Pa. 126 (1909), the non-abutting owner was refused compensation. It seems that the grade of the street was to be elevated and the non-abutting owner claimed that the elevation of the grade would or might injure. The Supreme Court, per Elkin, J., said: "This is too remote a possibility to sustain a present claim for consequential damages to a property not actually taken or disturbed in any way by opening the street." Tucker Street, Plumb's Appeal, 166 Pa. 336 (1895); Pittsburgh's Petition, Wilson and Snyder, *etc.*, Co.'s Appeal, 247 Pa. 384 (1915).

[97] 166 Pa. 336 (1895). Pittsburgh's Pet., 247 Pa. 384 (1913), is to be distinguished because in the former case the railroad elevated the tracks on its own right of way, whereas, in the latter, the elevation was in the street.

expense of shipping goods, *etc.*, proceeded against the city for damages. A report of a jury in the statutory proceedings awarding him damages was set aside on exceptions by the city, which was affirmed on appeal. The injury was not the proximate result of the change in the grade of the street.

Where a railroad company and a city entered into an agreement for the removal of grade crossings, apportioning the expense, and each assuming certain specific portions of the work, there is no joint liability; each is liable only for damage arising from the work done by it.[98]

Corporations in Highways.

The works of a corporation in a public highway may cause damages to abutting and non-abutting owners, either by the construction or enlargement of the works, or by the operation. The highway may be a road in the country or it may be a street in a city or borough. All of these cases must be distinguished. We shall begin with the case of a railroad company because that is first in historical development.[99] No distinction has been drawn in this connection between a rural and an urban servitude. All the cases of railroads have been those of occupation of streets in cities and boroughs. The reason no case has arisen as to a railroad in a country road is, perhaps, because the road is either crossed or, if occupied longitudinally, the old road is extinguished and a new road built. The damages to the abutting owner arise, therefore, simply from a taking.

[98] Tucker Street, Plumb's App., 166 Pa. 235 (1895), Phila., *etc.*, Iron Works v. Phila., 253 Pa. 69 (1916), affirming 24 D. R. 864 (1915). In Keeling v. Railroad Company, 205 Pa. 31 (1903), where a city and a railroad company entered into a contract for elevating the tracks of the railroad, the abutting owner, who filed a bill to restrain the work two months after the contract was signed, was held barred by laches, the railroad having in the meantime spent large sums of money and purchased and contracted to purchase valuable real estate on the faith of the contract.

[99] The reader will recollect that, prior to the Constitution of 1874, railroad companies were not liable for damages to abutting owners caused by the occupation of a public highway, in the absence of statutory provisions, but that by the general railroad act still in force they were liable to abutting owners for damages caused by an excavation or embankment in the construction of a road or street in a city or borough. See note 31 *ante.*

The decisions group themselves into two classes: (A) Those arising immediately after the adoption of the Constitution of 1874, when the chief controversy was over the constitutionality of the application of Article 16, Section 8, to railroads incorporated before the adoption of the constitution. (B) Those arising in recent years in which the nature and extent of the liability of the railroad and the nature of the right of the abutting owner have been discussed. We shall take up the cases in historical order.

In *Railroad Company* v. *Patent*,[100] an abutting owner brought an action on the case against the railroad company and recovered damages for interference with access. The company shifted its tracks on the street nearer the plaintiff's lot. The chief controversy was as to the constitutionality of the application of Article 16, Section 8, to the defendant, which was chartered before 1874.

In *Railroad Company* v. *Duncan*,[101] the abutting owner brought trespass on the case against the Pennsylvania Railroad Co. to recover damages caused by the occupation of Filbert Street by the elevated road. Judgment for the plaintiff was affirmed without any discussion of the nature of the abutting owner's right to recover. The charter of the defendant company, which had been obtained prior to the Constitution of 1874, did not appear to impose liability for consequential damages. The court, however, said that by acceptance of subsequent amendments the charter of the defendant became subject to the legislative power, and, as a consequence, the constitutional convention, as well as the legislature, had the power to subject the company's exercise of the power of eminent domain to liability for consequential damages (and that it was so subject presumably by the Constitution of 1874).[102] In this case the discussion was

[100] 17 W. N. C. 198 (1885); cf. Railroad Company v. Holland, 117 Pa. 613 (1888).

[101] 111 Pa. 352 (1886). The plaintiff had been refused an injunction in 94 Pa. 435 (1880).

[102] The decision was affirmed in the United States Supreme Court, reported in 129 Pa. 181 (1889), which seems to affirm the proposition that the exemption from consequential liability may be removed by the legislature, and is

chiefly as to the constitutional question involved. The statement claimed depreciation caused by construction and by noise and dust of operation. It did not appear whether the evidence supported all of these allegations, and no point was raised as to the liability for damages for operation of the railroad. This decision was followed by several others.

In *Railroad Company* v. *Walsh*,[103] the abutting owner recovered damages in an action on the case against the railroad company for damages caused by laying down tracks in the street in front of the plaintiff's property, these tracks having been laid next to the curbstone and interfering with the access to the lot.

In *Railroad Company* v. *Ziemer*,[104] the abutting owner also recovered damages in an action on the case, the railroad being constructed in the street at grade, on the ground of interference with drainage and injury to business of a store kept in a building on the property injured, but which store did not itself abut on the street.

In *Railroad Company* v. *McCutcheon*,[105] a lessee of abutting property brought an action on the case against a railroad company for constructing an elevated road in the street, the company having filed a bond to which the plaintiff had excepted, denying the right to occupy the street and the sufficiency of the bond. The court approved the bond without considering the question of the right to occupy. The railroad was constructed and put in operation and the plaintiff brought this suit. It was held that he could recover under the constitution for all damages direct and consequential which he had suffered or might suffer in consequence of the building and operation of the defendant's road.

not a part of the contract between the corporation and the state. Latchford, J., in 129 Pa. at 194, said that the Federal question involved was whether the Acts of 1846 and 1847 constituted a contract between the state and the defendant relieving the defendant from liability in this suit, and whether the contract was of such a character that its obligation could not be impaired by subsequent legislation by the state.

[103] 124 Pa. 544 (1889).

[104] 124 Pa. 560 (1889).

[105] 18 W. N. C. 527 (1886).

In Quigley v. *Railroad Company*,[106] there were statutory proceedings to assess damages for the right of way of a railroad in a street laid out but not opened, and it was held that the company was liable as it had no power to occupy the land of the property owner without paying damages. In this case the street had not been brought into existence.

In *Railroad Company's Appeal*,[107] where the railroad company did not have the power under the act of incorporation to occupy the street longitudinally, the abutting owner was awarded an injunction to restrain the company from laying the track in the street.

In *O'Malley* v. *Railroad Company*,[108] in an action of trespass, the abutting owner failed to recover damages for injuries caused by diversion of water from the street, as there were no facts shown on which the liability of the defendant to keep the water off plaintiff's property could be rested.

All these cases turned on the question of whether the imposition of the liability for consequential damages was constitutional, or, the right of the abutting owner to recover under the constitution was assumed without question; and in some of them it seems to have been assumed without discussion that there could be a recovery for damages caused by operation. In the cases next to be discussed, the nature of the abutting owners right to recover was examined, and the position taken by the Supreme Court is open to serious objection.

In *Jones* v. *Railroad Company*,[109] the plaintiff's lot was situate at a corner formed by the intersection of two streets, and the railroad crossed diagonally between the two other corners on an elevated structure that did not overhang any land of the plaintiff except such title as he might have had to the underlying fee of the street. The railroad was built on its own right of way to the edge of the street. The case was therefore more nearly that of a street crossing than that of a longitudinal occu-

[106] 121 Pa. 35 (1888).
[107] 18 W. N. C. 418 (1886).
[108] 36 Pa. Super. Ct. 92 (1909).
[109] 151 Pa. 30 (1892).

pation of a street. In this case the court said that the railroad in a highway was an additional serviture for which the abutting owner could recover damages: that the previous decisions in favor of the abutting owner had proceeded on the ground of a new servitude being imposed on the land, the construction affecting the adjacent owner by an interference with access and frontage. In this the court entirely overlooked the decision of the *Philadelphia & Trenton R. R. Co.'s Appeal,*[110] which clearly held that a railroad in a street was not an additional servitude. The court went on to say that in the case at bar there was a mere crossing made overhead for public convenience and that there was a new servitude because the vacation of the street would leave the owner with the burden of the overhanging bridge. The argument, however, as to the effect upon the vacation of the street, is beside the point, because when that occurred, if the street were taken away and the railroad left, the fee of the abutting owner would vest to the middle of the street, and he would then be entitled immediately to proceed for the assessment of damages for the servitude which he would then find upon his fee, to wit, the right of way of the railroad. The theory of the law prior to the constitution of 1874 was that the railroad use was swallowed up in the street use and was not an additional servitude. When, therefore, the greater use would cease, the smaller use would continue, and the abutting owner would then be entitled to damages because of it.

The court then went on to say, as to the measure of damages, that there was no actionable injury because of noise, smoke and dust, citing cases of operations by railroads on their own right of way; that there was no actionable interference with access to plaintiff's property where there was no obstruction on the street or surface; and that the plaintiff's right of action rested on the new servitude imposed. Also, said the court, if the elevated crossing did to an appreciable extent exclude light and air from the plaintiff's dwelling or affect the value of his property by reason of any additional servitude

[110] 6 Whart. 25 (1840).

imposed on it, for the injury so sustained the plaintiff could recover because such injury is the result of the construction of the defendant's railroad; and the measure of damages was not the depreciation in market value, but the injury inflicted by means of the additional servitude imposed on the plaintiff's property. The case was sent back for a new trial.[111]

In *Willock* v. *Railroad Company,*[112] the abutting owner brought an action of trespass to recover damages to his land caused by the construction of the defendant Railroad Co. in the bed of the street in front of his property. The Judge in the court below was asked to charge that the plaintiff could not recover unless he showed title to the fee underlying the street. He refused the point, following the well-settled law at that time, and charged the jury that the plaintiff was entitled to access to his property whether he owned further into the street than the curb line or not, and that he was entitled to recover if that access was interfered with by the construction and operation of the defendant's railroad. This was, *inter alia,* assigned as error. On appeal, the Supreme Court reversed, in an opinion by Mr. Justice Elkin, who said,[113] (1) That if the abutting owner has no title to the fee of the street he cannot recover damages because of property taken, injured or destroyed because he has not suffered a legal injury. For which proposition, the learned judge cites no authority, and for which it is believed, no authority can be found, for it is in direct contradiction to the cases we have just discussed. (2) That[114] Sec. 8, Art. 16 of the constitution "has been the source of much contention, and our earlier cases indicate a difference of view as to its proper interpretation." (The earlier cases are in surprising accord, and the first principal difference of view is that introduced by

[111] See the language of Rice, P. J., in Shinzel v. The Telegraph Company, 31 Pa. Super. Ct. 221 at page 234 (1906), where he said: "But the cases above cited (Jones v. The Railroad), as well as others, recognize this qualification as to elevated structures, that appreciable interference with light, air, access or drainage is an additional burden to which the land of the abutting owner cannot be subjected without rendering to him just compensation."

[112] 222 Pa. 590 (1909).

[113] P. 594.

[114] Middle of p. 598.

the learned judge himself.) "But that the rule has been finally well settled that there must be either an actual taking of or positive and visible injury to the property by an abutting owner on the street before there can be a recovery of damages."

He went on to say, "The construction of a railroad upon a public street already dedicated to public use as a highway imposes an additional servitude upon the owner of the fee and one not contemplated when the street was originally laid out," . . . "that the foundation of the right of action is the allegation that the abutting property owner has suffered some special injury by reason of the additional servitude upon the street caused by the construction of the railroad thereon, such, for instance, as interference with drainage, access, light and air. That injury to the complaining property must be special, different from that of the general public or else there can be no remedy. . . ." "Title to the property either taken or injured must necessarily be in the abutting owner who complains, because it is the taking of or injury to private property for which compensation is to be made. If no property be taken or injured, there is no damage to be compensated. In all such cases there can be no recovery unless special injuries are alleged and proven, and the proper measure of damages is the extent of those injuries to the abutting owner. It is true these special injuries may depreciate the value of the property, and we see no reason why inquiry should not be made as to the amount of depreciation in value caused by the special injuries about which complaint is made." In this the learned judge introduces an entirely novel principle into the situation. There is no previous case in which the right of the abutting owner to recover is made to depend upon his ownership of the underlying fee.

In *Philadelphia & Trenton R. R. Co.'s Appeal*,[115] the Supreme Court expressly said that it was immaterial whether the abutting owner owned the fee or not. The whole theory of the non-liability of the railroad for damages rested upon the principle that the construction of the road was not an additional servitude or burden upon the underlying fee.

[115] 6 Whart. 25 (1840).

Strangely enough, the learned judge found that the plaintiff did have the fee to one-half of the bed of the street, and that consequently part of the construction was upon his property. The reasoning, therefore, that the plaintiff could not recover if he did not have the fee was mere *dicta*, unnecessary to the decision of the case.[116]

In *Hobson* v. *Philadelphia*,[117] it was expressly decided that an abutting owner who did not own the fee of the bed of the street could recover damages for a change of grade. This case was apparently not brought to the attention of the learned judge, at least he does not attempt to distinguish it. It is difficult to see how it can be distinguished. In each case the right of accessibility is interfered with, and there is no question whatever of any injury to the underlying fee.[118]

In *Christy* v. *Railroad Company*,[119] the plaintiff brought trespass to recover damages caused by the defendants elevating their tracks on the street in front of his house, which elevation, he claimed, obstructed access and interfered with light and air. Judgment for defendant was affirmed on the appeal, on the ground that the plaintiff failed to show title to the bed of the street. This case, therefore, follows the *dictum* in the Willock case. It is, however, obscurely reported, and there is room to infer from the very scanty statement of facts, that the railroad

[116] This case came before the court again on second appeal, 229 Pa. 526 (1911), and was reversed and sent back for a new trial because a witness had, in fixing his estimate of the damages, taken into consideration the danger from the operation of the road, smoke and dust, and bringing in a cheaper class of houses, which elements, the court said, were forbidden and could not be taken into account.

[117] 150 Pa. 590 (1892).

[118] It is interesting to contrast the position taken by Mr. Justice Elkin in this case with that which he took in the case of Philadelphia Parkway, 250 Pa. 257 (1915), where he decided that a property owner was entitled to recover damages caused by the mere laying out of a street over his land before the street was opened. In the Willock case, he said that the abutting owner could not recover damages for injury to his property by the construction of the road in the street unless he owned the fee to the bed of the street, a proposition clearly contradicting all the previous authorities on the subject. And, in the Philadelphia Parkway case, he reverses another well-settled line of authorities and says that the owner was entitled in the proceeding at bar to recover damages for the injury to his property inflicted by the presence of a laid out but unopened street over it.

[119] 249 Pa. 245 (1915), s. c. 23 D. R. 682 (1914), 24 D. R. 240 (1915).

company occupied the street under a grant from the previous owner, and that what they did was within the terms of that grant.

The right to recover damages for a taking, and for interference with access, are two separate causes of action. The distinction was maintained in the case of *Kough* v. *Railroad Co.*,[120] where the plaintiff brought an action of trespass alleging an injury to his land and damages caused by the taking and by the operation of the railroad. Judgment for the plaintiff was reversed on appeal on the ground that the evidence showed that the railroad was constructed in the street in front of plaintiff's property, and that the damage, if any, was caused by interference with access, and, therefore, there was a variance between the *allegata* and *probata.*

It is submitted, therefore, that the doctrine that the right of the abutting owner to recover damages from a railroad occupying the street in front of his property depends on his ownership of the fee of the bed of the street, is unsupported by reason or authority, and is contrary to many decisions of the Supreme Court which were not noticed or discussed in the cases enunciating the principle.[120a]

The clause in the constitution of 1874 imposes a liability without reference to whether there is a taking of the land injured, indeed was adopted to provide for the very case where the land is injured and not taken, and in many cases decided since the Constitution of 1874 the Supreme Court has sustained the right of the property owner to recover without the suggestion of the idea that there was an additional servitude.

Where the railroad is constructed in a vacated or abandoned street or road, different principles are applicable. In such a case, the bed of the highway upon abandonment reverts to the abutting owner in fee,[121] and construction of the railroad is a taking

[120] 222 Pa. 175 (1908).

[120a] See language of the court in Faust v. Railroad Company, 3 Phila. 164 (1858), s. c. 25 L. I. 221, where it was said that since the plaintiff's damages were consequential, it was unnecessary to consider whether the fee to the bed of the street was in the abutting owner.

[121] Phillips v. Railroad Company, 78 Pa. 177 (1875).

of that fee, in the strict sense of the word, for which damages are recoverable just as in any other case of taking. This is perhaps the best place to refer to the case of *Curtis* v. *Railroad*,[122] where an abutting owner brought trespass against the railroad company to recover damages to his property caused by the relocation and elevation of a road adjacent thereto.[123] The plaintiff was nonsuited in the court below, because, in the opinion of the trial judge, the evidence showed that the road in question had been vacated. On appeal the Supreme Court reversed on the ground that the facts testified to did not show that the road was legally vacated and that the plaintiff had not abandoned his right to have the issue of the character of the road submitted to the jury with proper instructions as to the law. The decision was so inconclusive as to the rights of the parties, that it is really of little value as a precedent.[124]

The non-abutting owner cannot recover damages against a corporation occupying the street. In *Pennsylvania Co.* v. *Railroad Co.*,[125] a non-abutting owner brought trespass to recover damages caused by the construction of defendant's railroad in the street into which plaintiff's lot had a right of way. It was held that this right of way did not make plaintiff's lot the abutting lot, that he had suffered no injury except from dust, noise and smoke arising from operation, for which no recovery could be had, under the decision in *Pennsylvania R. R.* v. *Marchant*,[126] and *Railroad Co.* v. *Lippincott*,[127] which, how-

[122] 250 Pa. 480 (1915).

[123] While this is the statement in the report of the cause of action, its accuracy is open to question. The railroad company had built an embankment in the bed of the road, interfering with access to plaintiff's property. The cause of action was therefore the construction of the elevation in the road.

[124] If the road had been legally vacated, the plaintiff would probably have had a right to recover permanent damages in trespass for the taking of the fee. Such cause of action would be different from an action for consequential damages, Kough v. The Railroad Company, 222 Pa. 175 (1908), and an amendment or new writ would be necessary. If the theory of the Supreme Court is adopted, then the plaintiff cannot recover under the case of Willock v. The Railroad, 222 Pa. 590 (1909) without showing an ownership of the fee of the bed of the road.

[125] 151 Pa. 334 (1892).

[126] 119 Pa. 541.

[127] 116 Pa. 472 (1887).

ever, were not exactly in point because they were cases where the railroad company was operating on its own right of way.[128]

We now come to the case of the occupation of a highway by a corporation other than a railroad. Here we find a distinction drawn between the occupation of a country road, which is described as a rural servitude and therefore not sufficient in scope to include the use by the corporation, and the occupation of a city street, which is referred to as an urban servitude sufficiently extensive to allow for the corporate use. In the case of the rural servitude, there is said to be an additional servitude imposed by the corporation—a taking of the land of the abutting owner—consequently, there is no necessity to resort to the provisions of Article 16, Section 8 of the Constitution of 1874. In the case of a street in a city or borough, there is said to be an urban use and the right of the abutting owner to recover depends on the provisions in the Constitution of 1874. We shall discuss these cases in the order named.

In all cases where the construction of the corporation is in a country road, that is, a road which is not in a city or borough, the corporation is considered as imposing an additional servitude. In *Sterling's Appeal,*[129] an abutting owner obtained an injunction to prevent the laying of gas pipes in the public road in front of his house until compensation should be secured or made. The Supreme Court found that the defendant company had no power under its charter to lay the pipes, which finding really disposed of the case. The court said, however, by way of *dictum,* assuming that the company had the charter power, that the laying of the pipes was an additional burden on the fee, and hence was a taking within the meaning of the constitutional provision (Constitution of 1874, Art. 16, Sec. 8), requiring just compensation for property injured or destroyed. "In some cases it is possible the injury may be consequential as well as direct." The remedy at law, said the

[128] *Confer* as to right of non-abutting owner to recover from railroad company damages for change of grade. O'Brien v. The Railroad Company, 119 Pa. 184 (1888).

[129] 111 Pa. 35 (1885).

court, was inadequate, the injury being of a continuing and permanent nature.[130]

In *Dempster* v. *United Traction Co.*,[131] the court granted an injunction at the instance of the abutting owner against the construction of a street railway company in a township road on the theory that the consent of the township authorities did not have the same effect as the consent of a city, and consequently there was only a rural servitude, and the abutting owner could complain of the additional burden on his fee. The township did not have the statutory powers of boroughs and cities as to the street railway. Even if it had, it is not clear from the opinion of the court that it could exercise such powers unless it was in fact a borough. This case makes the question turn on the power of the local authorities over the road. It seems clear that the question of whether or not there is an additional burden on the fee of the abutting owner, cannot depend on the nature and extent of the power of the local authorities over the road.[132]

In several cases of statutory proceedings damages were assessed against corporations occupying public roads on the theory that the occupation was an additional servitude, and therefore, there was a taking of the underlying fee of the abutting owner.[133] The abutting owner may bring an action of

[130] In Brown v. Electric Light Co., 208 Pa. 453 (1904), an injunction was refused the abutting owner, as the bond had been filed in the statutory proceedings.

[131] 205 Pa. 70 (1903).

[132] In Springbrook Water Company v. Coal Company, 54 Pa. Super. Ct. 380 (1913), the water company laid its pipes in a township road without consent of the abutting owner and without making compensation. It consequently was a trespasser and unable to recover damages from an abutting owner caused by the sinking of the road bed owing to the defendant's mining operations.

[133] In Shevalier v. Telegraph Co., 22 Pa. Super. Court 506 (1903), on petition for the appointment of viewers by the telegraph company, the abutting owner received the depreciation in market value. The controversy was here chiefly as to the time of the assessment of damages. In Shuster v. Telegraph Co., 34 Pa. Super. Ct. 513 (1907), the construction of the telephone line undoubtedly subjected the abutting owner to an additional easement for the public use. The chief controversy was over the elements of damage. Depreciation in selling value seems to have been the measure of damages laid down. In Tannehill v. Phila. Co., 2 Pa. Super. Ct. 159 (1896), pipe was laid in the public road, and the chief question was as to evidence

trespass and recover permanent damages for the depreciation in market value. Thus an abutting owner on a public road is entitled to recover damages caused by construction of a street railway company. The measure of damages is the depreciation in market value of the abutting lot. In *Thompson* v. *Traction Co.*,[134] there was an action on the case. The railway company, however, in the construction of its line, changed the grade of the road, constructing an embankment. The railway company was unlawfully building without the consent of the plaintiff, without notice, and under general misapprehension as to the street railway law.

In *Osborne* v. *Railway Company*,[135] the trolley was built in the borough street, and the court below was reversed for failure to follow the rule as to measure of damages laid down in the Thompson case, that is, assessment of permanent damages.

In *Shimer* v. *Railway Company*,[136] which was an action of trespass, the plaintiff had filed a bill for an injunction which had been dismissed on bond being filed. The only question involved was as to the competency of witnesses. The court said, in sending the case back, that the plaintiff was entitled to any appreciation in the value of property in the neighborhood because of the construction of the trolley road.

Other cases have arisen of construction by pipe line and telegraph companies in country roads, in which cases the abutting owner has recovered damages in an action of trespass.[137]

and competency of witnesses. In Radnor Co. v. Electric Light Co., 208 Pa. 460 (1904), which was a case of construction of poles and wires in the road, the question arose on objection to approval of the bond as to the statutory power of the company, which the court affirmed.

[134] 181 Pa. 131 (1897).

[135] 9 Pa. Super. Ct. 632 (1899).

[136] 205 Pa. 648 (1893).

[137] In Hankey v. Phila. Co., 5 Pa. Super. Ct. 148 (1897), gas pipe and telephone lines were constructed in the public road, and the plaintiff recovered permanent damages in trespass. The case was sent back for a new trial because of error in treating it as an ordinary action of trespass. The measure of damages was the difference between the market value before and after. Zanzinger v. Electric Light Co., 6 D. R. 577 (1897), abutting owner recovered damages in an action of trespass for planting poles and stringing wires in the public road opposite his mansion, and of which road he owned the underlying fee. As to right of recovery against a turnpike company, see Wenger v. Rohrer, 3 Pa. Super. Ct. 596 (1897).

In case of malice, however, the railway company will be liable for more than the ordinary damages.[138]

In the case of a highway in a city or borough, the corporation is not considered as imposing an additional servitude, there is no taking, and the right of the abutting owner to recover depends entirely on Art. 16, Sec. 8 of the Constitution of 1874. Since no statute has been passed providing for such a case, he must bring an action of trespass and can recover only for damages caused by construction or enlargement and not for damages caused by operation.

In a number of cases the abutting owner was refused an injunction against the construction of a street railway in a city street, the company having been duly authorized to occupy the highway.[139]

Cases of suits against a street railway at law for damages are rare. In *Starr* v. *Traction Co.*,[140] an abutting owner brought trespass to recover damages, consisting of a crack in the wall of his house, alleged to be caused by the bumping of defendant's cars over a switch. Nonsuit was affirmed on appeal. There was no evidence to show that the crack was caused by

[138] In Becker v. Street Railway Co., 25 Pa. Super. Ct. 367 (1904), the railroad company had constructed its road without any right, against the warning and protest of an abutting land owner. An action was brought in trespass and the statement claimed damages by construction and operation: (a) interference with access and use of land, (b) interference with drainage. The case went off on the pleadings and was sent back for trial, the Superior Court saying, by Rice, P. J., that it was difficult to determine the true measure of damages until the evidence was all in.

[139] Lockhart v. Rwy. Co., 139 Pa. 419 (1891). The court said that it was an urbane servitude, not an additional burden, not a taking of private property, and that the legislature might authorize construction of a street railway in a city without compensation to abutting owner. The court below, however, was not clear, whether the damages could not be recovered at common law. In Rafferty v. Traction Co., 147 Pa. 579 (1892), the application of an abutting owner for an injunction against the operation of a cable street railway in the street was refused. The railroad company was duly authorized to lay the tracks and it had obtained municipal consent. It was held that there was no additional servitude. Dutton v. Railway Company, 1 Mont. Co. 4 (1885), *accord*. Cooke v. Telegraph Co., 21 Pa. Super. Ct. 43 (1902). Injunction against erection of pole by telephone company refused. Bill demurrable on other grounds. Faust v. Railroad Company, 3 Phila. 164 (1858), 25 L. I. 221. Injunction against construction of street railway refused.

[140] 193 Pa. 536 (1899).

the bumping nor was there any evidence of improper construction or of negligence. The judge in the court below went on to say that the abutting owner must put up with the noise and inconvenience of the trolley cars in the city.

In *Sockett* v. *Transit Co.*,[140a] the abutting owner owning the fee to the middle of the street in a borough recovered damages in an action of trespass for interference with light and air by the construction of defendant's elevated street railway on the plaintiff's side of the street. The superstructure projected over the sidewalk within seven feet of the front wall of plaintiff's building. A verdict for the plaintiff was affirmed, and the court distinguished the other cases on the ground that here the structure was erected on the sidwalk.

In a number of other cases, the abutting owner has brought an action for trespass caused by the damages where the construction is in a street. In *McDevitt* v. *Gas Co.*,[141] a natural gas company chartered under the Act of May 29, 1885,[142] known as the Natural Gas Act, was given permission by the City of Pittsburgh to occupy streets.[143] The company began laying gas pipes under the sidewalk in front of plaintiff's house. The plaintiff applied for an injunction, which was granted and then dissolved upon the company's giving a bond to indemnify the plaintiff for any loss sustained. The bond was given, the gas mains laid, and the plaintiff then began proceedings in the Common Pleas for appointment of viewers and assessment of damages. It was held that the laying of the pipes was not an additional servitude in a city street, the city having given its

[140a] 62 Pa. Super. Ct. 542 (1916).

[141] 160 Pa. 367 (1894). The fourth paragraph of the syllabus in this case reads as follows: "In such a case if the owners have suffered direct injury by [the disturbed condition of the sidewalk during the process of laying the pipe], *or consequential injury to their property due to the proximity of the pipe line*, they must proceed by an action of trespass, or upon the company's bond, if such has been given." The clause enclosed in brackets is not in the opinion of the court and is a notion only of the reporter. The phrase italicised was said to be too broad in a note to Provost v. Water Co., 162 Pa. 275 at 279 (1894). The author of the note is not disclosed.

[142] P. L. 29.

[143] The restrictions attached to the permission were held void in Appeal of the City of Pittsburgh, 115 Pa. 4 (1886).

consent; that the fact that the pipes were laid under the sidewalk did not alter the rule, and as there was, therefore, no exercise of the power of eminent domain, the proceeding for appointment of viewers was inappropriate. The court said that if the lots were affected in value it was as a consequence of the proximity of the pipe line and not because of anything done on or to them. The remedy in such a case is by action or trespass or upon the bond given to secure the dissolution of the injunction.

In *Provost* v. *Water Co.*,[144] the water company laid a main in the sidewalk in the city street in front of plaintiff's premises. After the water main was laid, it appeared that the abutting lot was thereby prevented from constructing certain cellar steps, basement windows, *etc.* The abutting owner, who bought after the main was laid, brought an action of trespass against the water company, and the court gave binding instructions for the defendant on the ground that the action was personal to the owner of the land at the time of laying the pipes, which decision was affirmed on appeal. The plaintiff had no cause of action as his only damages were those caused by the laying of the pipe interrupting access. In *Shinzel* v. *Bell Telephone Co.*,[145] the abutting owner brought trespass for damages caused by the erection of a pole in a street in Philadelphia in front of plaintiff's property. It was held he could recover for the appreciable interference with light, air, accessibility and frontage, but could not recover for unsightliness of poles and noises ordinarily incident to the operation, without negligence, of the lawful business, and from the maintenance of the poles and wires.

In *Bartholomew* v. *Telephone Company*,[145a] a bill in equity was filed by the abutting owner of a lot in the Borough of Sunbury, and the court, conceding the lawful right of the telephone company to occupy the street, issued an injunction specifically controlling the location of a pole in front of plaintiff's lot

[144] 162 Pa. 275 (1894).
[145] 31 Pa. Super. Ct. 221 (1906).
[145a] 29 Pa. C. C. R. 390 (1904).

in order to prevent irreparable injury to the lot and the imposition of undue and unnecessary burdens thereon.

The reason for the distinction between the rural and urban servitude is not very clear and seems to have been assumed without much discussion. Nothing has been found in the books except the remarks of Mr. Justice Dean, as follows:

"It is settled law, that abutting owners on streets and alleys in cities and boroughs have no claim for damages by reason of the appropriation of the surface or subsurface for public improvements to the advantage and benefit of all the inhabitants; it is much easier to say that such is the settled law, than to give a wholly satisfactory reason for it; the one usually given both in *McDevitt* v. *People's Nat. Gas Co.*, 160 Pa. 367, and in many cases preceding it, is, that the borough is the representative of the inhabitants, considering their health, their family comfort and their business needs; and every lot owner shares in the benefits which such an appropriation of the streets and alleys confers. If it abridges his control of the soil, it makes him a sharer in the public advantage resulting from the appropriation. In a legal sense, it is an invasion of his rights, but that is *damnum absque injuria*. But whether the reasoning to sustain the law be satisfactory or not, as a fact, the law is so deeply imbedded and firmly fixed as a rule of action, that it is not likely to be disturbed, at least in our day." [146b]

(*To be concluded.*)

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[146b] Dempster v. United Traction Co., 205 Pa. 70 at 78 (1903); see also remarks of Rice, P. J., in Shinzel v. Telephone Co., 31 Pa. Super. Ct. 221 at 231 (1906), and of Green, J., in Wood v. McGrath, 150 Pa. 451 at 455, *et seq.* (1892).